L & A Juice Company, Inc. *and* Food, Industrial & Beverage Warehouse, Drivers, and Clerical Employees, Local 630, International Brotherhood of Teamsters, AFL–CIO. Case 21–CA–31910

June 12, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge filed on March 7, 1997, the General Counsel of the National Labor Relations Board issued a complaint on April 4, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 21–RC–19701. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On May 5, 1997, the General Counsel filed a Motion for Summary Judgment. On May 6, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 20, 1997, the Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objection in the representation proceeding that Union Agent Hurtado engaged in electioneering in the polling area on the day of the election.

It is well established that, in the absence of newly discovered and previously unavailable evidence or other special circumstances requiring reexamination of the decision in the representation proceeding, a respondent is not entitled to relitigate in a subsequent refusal-to-bargain proceeding representation issues that were or could have been litigated in the prior representation proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Here, although the Respondent asserts in its response that it has recently discovered certain new evidence concerning Hurtado's agency status that was not considered in the representation proceeding, we find that the Respondent's alleged new evidence does not warrant reexamination of the hearing officer's decision in that proceeding. The Respondent's new evidence consists solely of the statements of two individuals: one states that he overheard Hurtado tell his cousin sometime in early 1997 that "I have here a check from the Union"; and the other states that Hurtado and two other employees conducted various union meetings, the last of which took place on the Sunday immediately after the election to discuss and celebrate the election results, without anyone else from the Union being present. The Respondent asserts that the former statement indicates that Hurtado was a paid union agent during the election, and further asserts that the Union and Hurtado deliberately concealed this fact by postponing the payments until the hearing officer's report issued on December 27, 1996. The Respondent cites no evidence of such a plan, however, and Hurtado's allegedly overheard statement in early 1997 about having a union check is clearly insufficient evidence by itself of such a plan. Checks for reimbursement of expenses, for example, would not automatically transform an employee into a union agent, and there is no proffer of evidence concerning the reason for the check Hurtado is alleged to have received. Finally, with respect to the statement regarding meetings allegedly conducted by Hurtado and other employees up to the Sunday immediately after the election, we find that the Respondent has failed to show that such evidence was unavailable prior to the November 20 and 21, 1996 hearing on its objections.[1] In any event, such evidence is also inconclusive of Hurtado's agency status.

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation with its principal offices and a manufacturing facility located in City of Industry, California, has been engaged in the manufacture of fruit juice products. During calendar year 1996, a representative period, the Respondent, in conducting its operations described above, sold and shipped, or caused to be shipped, from its City of Industry, California facility goods valued in excess of $50,000 directly to points outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The Respondent does not contend that such unavailability is established by the bare assertion in the individual's statement that he was unwilling to speak to anyone about the meetings at that time because he was "concerned about attacks from the Union." In any event, even if the Respondent had so contended, we would reject that contention.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held October 18, 1996, the Union was certified on February 10, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production employees, maintenance employees, drivers, forklift operators, warehouse employees, quality control inspectors (line inspectors), freezer employees, machine operators and line employees employed by the Respondent at its 16195 Stephens Street, City of Industry, California facility; excluding all other employees, office clerical employees, professional employees, lab technicians, temporary employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since February 20, 1997, the Union has requested the Respondent to bargain and, since March 5, 1997, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 5, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, L & A Juice Company, Inc., City of Industry, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees, Local 630, International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time production employees, maintenance employees, drivers, forklift operators, warehouse employees, quality control inspectors (line inspectors), freezer employees, machine operators and line employees employed by the Respondent at its 16195 Stephens Street, city of Industry, California facility; excluding all other employee, office clerical employees, professional employees, lab technicians, temporary employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in City of Industry, California, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees and former employees employed by the Respondent at any time since March 7, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Food, Industrial & Beverage Warehouse, Drivers and Clerical Employees, Local 630, International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time production employees, maintenance employees, drivers, forklift operators, warehouse employees, quality control inspectors (line inspectors), freezer employees, machine operators and line employees employed by the Employer at its 16195 Stephens Street, City of Industry, California facility; excluding all other employees, office clerical employees, professional employees, lab technicians, temporary employees, guards, and supervisors as defined in the Act.

L & A JUICE COMPANY, INC.